85 - 1636

No. 86-_____

Supreme Court, U.S.
FILED
APR 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1985

CLARENCE H. O'DONNELL, PETITIONER

v.

THE HONORABLE JAMES C. PAINE, JUDGE OF UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, RESPONDENT

Petition for a Writ of Certiorari
to the Eleventh Circuit Court of Appeals

CLARENCE H. O'DONNELL
Attorney Pro Se for Petitioner
4402 Southwest 24th Avenue
Fort Lauderdale, Florida 33312
305 / 963-2940

QUESTION PRESENTED FOR REVIEW

1. Whether Petitioner, in his federal criminal trial, has the right under the 6th Amendment to the United States Constitution to hybrid counsel in the defense of the charges.

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In The

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NO. 86-_____

CLARENCE H. O'DONNELL, PETITIONER

v.

THE HONORABLE JAMES C. PAINE, JUDGE OF UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, RESPONDENT

Petition for a Writ of Certiorari
to the Eleventh Circuit Court of Appeals

Petitioner requests that a Writ of Certiorari issue in this case, to review the judgment of the United States Court of Appeals denying Petitioner's request for the issuance of a Writ of Prohibition or Mandamus to the

Respondent.

REPORT OF OPINIONS BELOW

The Eleventh Circuit Court of Appeals denied the Petitioner's Petition for Writ of Prohibition or Mandamus in an unpublished decision on the 23rd day of December, 1985. Said Order appears herein as Appendix A. On the 10th day of February, 1986, the same Court denied Petitioner's Application for rehearing and Suggestion for Rehearing en banc. Said Order appears herein as Appendix B.

JURISDICTIONAL STATEMENT

1. The date of the last order issued by the Eleventh Circuit Court of Appeals denying rehearing was February 10, 1986.

The Rules of the United States Supreme Court, Rule 20.1 provides:

> "a petition for writ of certiorari ... shall be deemed in time when it is filed with the Clerk within sixty days after the entry of ... judgment."

Sixty calendar days from February 10, 1986, would fall on April 11, 1986, for timely filing. The Petitioner has met that jurisdictional deadline.

2. The jurisdiction of this Court is duly invoked, pursuant to Article III, Section 2, of the Constitution of the United States.

3. Jurisdiction is specifically set out by statute in this cause by 28 USC §1254, relating to reviewing decisions of a United

States Court of Appeals by certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United States

Amendment Six of the United States

Constitution states in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to. . .have the Assistance of Counsel for his defense."

26 USC §7203 states as follows:

> "Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return..., keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000, ($100,000 if a corporation) or imprisoned not more than 1 year, or both, together with the costs of prosecution."

STATEMENT OF THE CASE

A. Disposition below.

The above-named Petitioner is presently under indictment in the United States District Court for the Southern District of Florida. He has been charged with three counts of willful failure to file federal income tax returns for three separate years. See 26 USc §7203. The indictment was returned on April 4, 1985.

Within the time period set by the Court, Petitioner filed several motions in a pro se capacity, one of which was a motion for leave to proceed by way of Hybrid representation. That is to say, representing himself with the assistance of licensed counsel. Petitioner has in fact retained private, licensed counsel to assist in his defense, and such counsel has appeared in the case.

By "order" dated July 12, 1985, a magistrate of the Southern District of Florida denied the afore-mentioned motion. The said

"order" stated that the Petitioner had "no right to appear partly by himself and partly by counsel." ("Order" of Magistrate Palermo, page 1.)

The Defendant then filed a motion asking the district court, specifically Judge Paine, to rehear the motion in accordance with 28 USC §636(b)(1)(A). On the 6th day of September, 1985, Judge Paine did rehear the motion and issued an order denying the same. Judge Paine's Order stated simply that after a de novo review, he found that Magistrate Palermo's Order was "according to law."

On the 8th day of October, 1985, the Petitioner filed with the United States Court of Appeals for the Eleventh Circuit, a Petition for Writ of Prohibition or Mandamus, which would prevent the district court from proceeding with any trial of the case unless and until the Petitioner was afforded his right to hybrid counsel for his defense.

On the 23rd of December, 1985, the

Petition was denied by a panel of Eleventh Circuit Judges consisting of Judges Tjoflat, Vance, and Kravitch.

A timely Petition for Panel Rehearing and Request for Rehearing en banc was submitted by the Petitioner, and denied by the Eleventh Circuit on February 10, 1986.

B. Facts.

Petitioner, a criminal defendant charged with violating three federal criminal statutes, seeks to conduct his own defense with the assistance of experienced, licensed, qualified counsel. He does not wish to delegate to said counsel the power and authority to make all the binding decisions in this case, which decisions are sure to affect the Petitioner for the rest of his life.

As it presently stands, the district court has placed the Petitioner in a position where he must make an all or nothing choice. He must elect to represent himself completely without the benefit of learned counsel, or, he

must totally surrender his right to participate in his own defense and delegate all control of the case to counsel.

As herein after more fully presented, this choice places unConstitutional restrictions upon the Petitioner which this Court is bound to correct before this matter goes to trial.[1]

---

[1] The case is not presently set for trial. Due to serious medical problems facing the Petitioner, all proceedings have been stayed.

REASONS FOR GRANTING WRIT

Contention: The Sixth Amendment to the United States Constitution provides that the accused in any criminal case shall enjoy the right to assistance of counsel. The Amendment makes no proviso to the effect that his right to conduct the case in his own proper person is waived once counsel is employed. Indeed, the use of the term "assistance" in the Amendment manifests an intent upon the part of the framers that control of the case is to remain at all times in the hands of the accused, to be delegated at such times and in such amounts as the defendant alone deems appropriate.

Failure of the Court to permit the Petitioner here to so proceed is a violation of Petitioner's right to conduct his defense with the kind of assistance referred to in the Amendment.

Argument:

The Sixth Amendment to the United States

Constitution provides that in all criminal cases, the accused shall enjoy the right to the "Assistance of Counsel for his defense." This right is so basic that refusal to grant a criminal defendant his right to counsel will result in the automatic reversal of his conviction. **Holloway v. Arkansas**, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978).

Equally settled is the proposition that a criminal defendant is entitled to manage and conduct his own defense pro se, that is to say, by himself without counsel. **Faretta v. California**, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Counsel may not be forced upon a defendant who wishes to represent himself pro se, or is otherwise unwilling to accept counsel. **Adams v. United States**, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 168 (1942).

The right to conduct one's own cause is protected by the Sixth Amendment, as fully as the right to the assistance of counsel is protected. It therefore follows, logically and naturally,

that one has the right to adopt the status of co-counsel a with licensed attorney for the purpose of defending the criminal charge.

To the extent that the district court has forced the Petitioner into an all or nothing position, such action has clearly transgressed the Constitutional mandate of the Sixth Amendment right to counsel. Indeed, the Constitution of the State of Florida provides, at Article 1, §16, that the accused has the right to defend either by himself, by counsel, **or both.** The meaning of this language is obvious. The framers of the Constitution, both state and federal, never intended to force a defendant to choose between representing himself and being represented by counsel.

The use of the phrase "Assistance of Counsel" in the Sixth Amendment manifests this intent. See **Self-Representation in Criminal Trials: The Dilemma of the Pro Se Defendant**, 59 Cal. L. Rev. 1479 (1971). An assistant is not a principal, but rather an agent acting at the

direction and with the consent of the principal where full control is left in the hands of the principal. Where a defendant accepts counsel and waives his right to pro se representation, control of the case is vested in the hands of that counsel and the defendant is relegated to the position of agent, rather than principal.

The Sixth Amendment never intended that such take place. Rather, the Amendment guarantees that the defendant would at all times be in a position to make the choices and decisions which would no doubt effect the rest of his life. For example, the Supreme Court, in **Snyder v. Massachusetts**, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934), held that the Confrontation Clause of the Sixth Amendment gives the accused a right to be present at all stages of the proceedings where fundamental fairness might be thwarted by his absence.

This right to "presence" was based upon the premise that the "defense may be easier if the accused is permitted to be present at the

examination of jurors or the summing up of counsel, for it will be in his power, if present, to give advise or suggestion **or even to supersede his lawyers altogether and conduct the trial himself**." 291 U.S. at 106. (Emphasis added.)

Under **Snyder**, therefore, when read in the light of **Faretta**, the defendant clearly has the right to conduct his defense in the capacity as co-counsel with his licensed lawyers. To deprive him of this right is to deny him the right to counsel under the Sixth Amendment.

Moreover, in **United States v. Plattner**, 330 F.2d 271, the Court of Appeals for the Second Circuit emphasized that the Sixth Amendment grants the accused the rights of confrontation, of compulsory process for witnesses in his favor, and of assistance of counsel as minimum procedural requirements in federal criminal prosecutions. The right to the assistance of counsel, the Court held, was intended to supplement the other rights of the defendant, and not to impair "the absolute and primary right to

conduct one's own defense in propria persona." 330 F.2d at 274.

The language and holdings of the cases is plain. A defendant may not properly be forced to choose between self-representation and the assistance of counsel. The Sixth Amendment guarantees the right to proceed without counsel or with the assistance of counsel. The right lies with the defendant, not with the court. The Petitioner, therefore, has every right to the assistance of counsel while at the same time maintaining his status as pro se in the defense of his case.

Faretta points out that there is a clear difference between "counsel" as used in the 6th Amendment, and "representative" as used by contemporary courts. On this point, the Court opined:

> "The language and spirit of the 6th Amendment contemplate that counsel, like the other defense tools guaranteed by the

> Amendment, shall be an aid to a willing defendant -- not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists. It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas. (Citations) **This allocation can only be justified, however, by the defendant's consent, at the outset, to accept counsel as his representative.* * *"** 422 U.S. at 820, 45 L.Ed. at 573. (Emphasis added.)

As observed by the Supreme Court, if the defendant voluntarily chooses to relinquish

control of the case to his counsel, he must live with the consequences. Where the choice is made to permit counsel to manage the case, that counsel necessarily has the discretion to make "binding decisions" as to how the cause will be conducted. But that is the very thing the Petitioner here is seeking to avoid. He wishes to make the decisions on the conduct of the trial, not be bound by decisions made by his counsel. At the same time, he wishes to avail himself of the skill and expertise of learned counsel in areas of a federal criminal case.

The Petitioner has the absolute right to manage this case. He cannot be stripped of this right simply because he chooses to employ expert assistance in the conduct of the case. It must be remembered that Petitioner is on trial here, not his lawyer. He is the accused and it is he to whom the protections of the Constitution are addressed. If he wishes to have expert assistance in the management and presentation of his cause, he should and cannot lawfully be made

to suffer deprivation of Constitutional rights as a result.

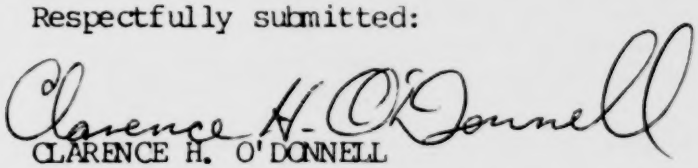
The Petitioner here does not accept counsel as his representative. He wishes to have the assistance of counsel. There is a vast and important difference in the two, and this difference is pointed out by the Supreme Court in the foregoing cases. The district court's refusal to recognize them will result in the deprivation of paramount Constitutional protections guaranteed this Petitioner.

The Order of the district court and the decision of the Court of Appeals to let it stand are in serious conflict with the Sixth Amendment and with prior decisions of this Court, cited above. The lower courts have so far departed from the course of settled principles of Constitutional law that to permit the decisions to go unreviewed will amount to an epic travesty of justice.

The Writ of Certiorari sought in this case should be issued so that a decision which

stands to effect axiomatic principles of criminal justice can be reviewed and reversed.

Respectfully submitted:



CLARENCE H. O'DONNELL

Attorney Pro Se for Petitioner
4402 Southwest 24th Avenue
Fort Lauderdale, Florida 33312

DECLARATION OF SERVICE

I, Clarence H. O'Donnell, attorney pro se, Petitioner herein, hereby declare under penalty of perjury that on the 5th day of April, 1986, I served three copies of the foregoing Petition for Writ of Certiorari on the United States of America, by mailing the same to Michael L. Paup, Chief, Appellate Section, United States Department of Justice, Tax Division, Washington, D.C., 20530, via first class mail in a postage pre-paid wrapper.

Clarence H. O'Donnell

Clarence H. O'Donnell

APPENDIX A

United States Court of Appeals
Eleventh Circuit
Office of the Clerk
50 Spring Street SW
Atlanta, Georgia 30303-3147

Spencer D. Mercer
Clerk

In Replying give number of case and names of parties

December 23, 1985

Robert M. March, Clerk
United States District Court
701 Clematis Street
Room 402
West Palm Beach, FL 33401

No. 85-5901
IN RE: CLARENCE H. O'DONNELL
D.C. Docket No. 85-6072-CR-JCP

Dear Mr. March:

Enclosed is a certified copy of this Court's order entered this date which is self-explanatory and is issued as and for the mandate.

Please acknowledge receipt on the enclosed copy of this letter.

Very truly yours,

SPENCER D. MERCER, Clerk

By: /s/ Karen B. Sinyard
Deputy Clerk

Enc.

cc: Clarence H. O'Donnell
Honorable James C. Paine

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-5901

IN RE:

FILED
U.S. Court of Appeals
Eleventh Circuit

Dec 23 1985

SPENCER D. MERCER
CLERK

CLARENCE H. O'DONNELL,

Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Southern District of Florida

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Before TJOFLAT, VANCE, and KRAVITCH, Circuit Judges.

B Y T H E C O U R T:

The petition for writ of mandamus is DENIED.

APPENDIX B

United States Court of Appeals
Eleventh Circuit
Office of the Clerk
50 Spring Street SW
Atlanta, Georgia 30303-3147

Spencer D. Mercer
Clerk

In Replying give number of case and names of parties

February 11, 1986

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 85-5901
IN RE: CLARENCE H. O'DONNELL

The following action has been taken in the above case:

xx The enclosed order has been ENTERED.

____ AN EXTENSION OF TIME has been granted to and including

___ for filing appellant's/ petitioner's brief.

___ for filing appellee's/ respondent's brief.

___ for filing reply brief.

___ for filing petition for rehearing.

___ This extension is granted subject to the condition that no additional extensions will be requested by the movant and that the specified document will be filed on or before this new date.

____ Motion to consolidate granted.

____ Motion to supplement or correct the record granted.

____

SPENCER D. MERCER, CLERK

By: /s/ Karen B. Sinyard
Deputy Clerk

cc: Clarence H. O'Donnell

MOT-2

THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 85-5901

FILED
U.S. Court of Appeals
Eleventh Circuit

FEB 10 1986

SPENCER D. MERCER
CLERK

IN RE:

CLARENCE H. O'DONNELL,

Petitioner.

- - - - - - - - - - - -

On Petition for Writ of Mandamus to the United States District Court for the Southern District of Florida

- - - - - - - - - - - -

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(February 10, 1986)

Before TJOFLAT, VANCE, and KRAVITCH, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____
United States Circuit Judge

REHG-6
(Rev. 6/82)